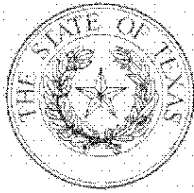


State Office of Administrative Hearings



Cathleen Parsley
Chief Administrative Law Judge

February 14, 2014

Anne Idsal, General Counsel
Texas Commission on Environmental Quality
P.O. Box 13087
Austin Texas 78711-3087

Re: **SOAH Docket No. 582-13-4773; TCEQ Docket No. 2011-1907-MWD-E;**
*Executive Director of the Texas Commission on Environmental Quality v. City
of Bridge City*

Dear Ms. Idsal:

On January 8, 2014, the Administrative Law Judge (ALJ) issued the proposal for decision (PFD) in this enforcement case. The Executive Director (ED) timely filed exceptions to the PFD on January 29, and the City of Bridge City responded to those exceptions on February 7. The ALJ has reviewed these pleadings and recommends that the Commission overrule the ED's exceptions regarding the self-contained breathing apparatus (SCBA) violation, but grant his exception regarding the correct spelling of "Jennifer Cook" in Finding of Fact No. 23.

SCBA Violation

The ED excepts to the ALJ's finding on the allegation involving a SCBA. The ED contends that the parties stipulated to the SCBA violation and that stipulation should be honored in this case.¹ Bridge City counters that it agreed with the ED that it "did not have a SCBA device located in the open air sewage facility [but] the City did not stipulate that a SCBA device was ever required in an open air facility."²

¹ ED Exceptions at 6-7.

² Bridge City's Response at 3.

The dispute about the extent of the stipulation was discussed during the hearing and both parties presented evidence and provided written arguments on the issue. In his initial closing argument, the ED stated that “[t]he City also did not stipulate to the [SCBA] violation claiming the City was not provided notice of [the SCBA] requirement”³ The parties treated the SCBA allegation as a contested issue in the hearing, as did the ALJ in the PFD.⁴

The ED also argues that, regardless of the stipulation, he met his burden of proof on the violation. The ED disagrees with the ALJ’s conclusion that the SCBA requirement is not an operation and maintenance requirement. The ED argues that if a wastewater treatment plant (WWTP) “is not maintained and operated consistent with the minimum design criteria, then the WWTP is not being properly operated and maintained.”⁵ He further states that although 30 Texas Administrative Code chapter 217 “arguably may not apply” to Bridge City,⁶ the TCEQ’s prior design criteria in repealed chapter 317 would be applicable to the WWTP.

As stated in the PFD, the ALJ concluded that the applicability language in the TCEQ’s current chapter 217 shows that the design criteria apply only to those persons who are constructing or altering a WWTP,⁷ not to every permittee as general operation and maintenance requirements.⁸ That conclusion is supported by the ED’s statement that chapter 217 “may arguably no apply” not apply to Bridge City. The ED appears to assume that if chapter 217 does not apply, then chapter 317 must apply. However, Texas Water Code § 26.034 may not support the assumption that one chapter or the other has to apply to Bridge City.

Section 26.034 enables the Commission to conduct plans and specifications review and provides that only a person who “proposes to construct or materially alter” a WWTP is required to submit plans and specifications that substantially comply with the Commission’s design standards.⁹ According to the Commission’s response to comments interpreting that statute,

³ ED Initial Closing Argument at 7.

⁴ PFD at 4.

⁵ ED Exceptions at 7.

⁶ ED Exceptions at 8.

⁷ 30 Tex. Admin. Code § 217.1(a).

⁸ PFD at 10-11.

⁹ Tex. Water Code § 26.034(b), (c).

“[o]nly new construction or changes that alter the efficiency of a treatment facility . . . *will be subject* to the new design criteria.”¹⁰ Therefore, if Bridge City did not construct or make material alterations to its WWTP while chapter 217 or chapter 317 was in effect, then the SCBA design criteria in either chapter may not apply to its WWTP. Unlike other TCEQ rules, design criteria are not generally applicable to every permittee as operation and maintenance requirements.

The ED also asserts that the Texas A&M Engineering Extension Service (TEEX) manual sets out the industry standard of having a SCBA onsite, as does the Texas Water Utilities Association (TWUA) manual.¹¹ He contends that Operational Requirement No. 1 in Bridge City’s TPDES permit requires compliance with industry standards, and therefore, the two manuals demonstrate that the City violated Operational Requirement No. 1. However, Operational Requirement No. 1 provides:

The permittee shall at all times ensure that the facility and all of its systems of collection, treatment, and disposal are properly operated and maintained. This includes the regular, periodic examination of *wastewater solids* within the treatment plant by the operator in order to maintain an appropriate quantity and quality of solids inventory as described in the various operator training manuals and *according to accepted industry standards for process control* such as the Commission’s “Recommendations for Minimum Process Control Tests for Domestic Wastewater Treatment Facilities.”. . .¹²

Operational Requirement No. 1 refers to industry standards in the context of the “process control” of wastewater solids. However, the SCBA design criteria in both chapters 217 and 317 do not refer to a SCBA as “process control” equipment, but as “safety equipment,”¹³ and “respiratory and protective equipment.”¹⁴ The TWUA manual also discusses the SCBA in the context of safety.¹⁵ In the ALJ’s opinion, the language regarding “industry standards for process control” is insufficient to put Bridge City on notice that the lack of safety equipment would result in a violation of Operational Requirement No. 1.

¹⁰ 33 Tex. Reg. 6870 (Aug. 22, 2008) (emphasis added).

¹¹ ED Exceptions at 8.

¹² ED Ex. 2 at 11 (emphasis added).

¹³ 30 Tex. Admin. Code § 317.6(b)(D) (2008 ver., since repealed).

¹⁴ 30 Tex. Admin. Code §§ 217.279(d)(2), 217.324(a).

¹⁵ ED Ex. 36.

On a side note, Bridge City stated in its response to the ED's exceptions that "[i]t is undisputed that the City did have a SCBA device available to the employees within the service vehicle that was utilized to access the open air sewage facility."¹⁶ Bridge City's witnesses did testify that at the time of the inspection, the SCBA was in the truck used to transport employees to and from the WWTP. However, the ALJ understood that Bridge City did not dispute the facts in the stipulation.¹⁷ Therefore, the ALJ made a factual finding that Bridge City did not provide or make available a SCBA for use at the WWTP,¹⁸ but the ALJ came to the legal conclusion that the facts did not demonstrate a violation of the rules and permit provisions pled by the ED.¹⁹ Bridge City did not except to the ALJ's proposed Finding of Fact No. 13, and the ALJ does not recommend any changes to that finding of fact.

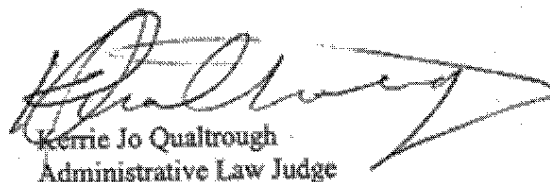
Finding of Fact No. 23

In Finding of Fact No. 23, the ALJ misspelled the name of the ED's attorney. The ALJ recommends that the ED's exception to Finding of Fact No. 23 be granted, and the name be spelled correctly as "Jennifer Cook."

Summary

For the reasons set forth in the PFD and this letter, the ALJ recommends that the Commission overrule the ED's exceptions regarding the SCBA violation and associated penalty. However, the ED's exception regarding Finding of Fact No. 23 and the spelling of "Jennifer Cook" should be sustained, and the finding of fact changed accordingly.

Sincerely,



Kerrie Jo Qualtrough
Administrative Law Judge

¹⁶ Bridge City's Response to ED's Exceptions at 3.

¹⁷ PFD at 10.

¹⁸ Proposed Order at FOF No. 13.

¹⁹ Proposed Order at COL No. 9.

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STYLE/CASE: CITY OF BRIDGE CITY
SOAH DOCKET NUMBER: 582-13-4773
REFERRING AGENCY CASE: 2011-1907-MWD-E

**STATE OFFICE OF ADMINISTRATIVE
HEARINGS**

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